IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:	)	Chapter 11 Case
	)	Number 98-60429
COUNTRY CHRYSLER, PLYMOUTH, DODGE, JEEP, EAGLE, INC.,	)	
Debtor-in-Possession	)	
	)	FILED
COUNTRY CHRYSLER, PLYMOUTH DODGE, JEEP, EAGLE, INC.	)	at 2 O'clock & 00 min. P.M. Date 2-12-99
Movant	)	
vs.	)	
FIRST COAST AUTO SALES, INC.	)	
Respondent	)	

ORDER

By motion Country Chrysler, Plymouth, Dodge, Jeep, Eagle, Inc. ("Debtor"), seeks to dismiss this chapter 11 case. First Coast Auto Sales, Inc. ("First Coast"), an unsecured creditor, objects to dismissal, asks for conversion to chapter 7 and the appointment of a trustee to pursue the avoidance of preferential/fraudulent transfers for the benefit of unsecured creditors. First Coast also asks that a consent order between Debtor and Chrysler Financial

Corporation ("Chrysler"), entered by this court on July 2, 1998, be vacated. The objection of First Coast is overruled and First Coast's motion to vacate is denied. The case is dismissed.

The motion to dismiss, subsequent objection and motion to vacate, stem from the following facts. A floor plan financing agreement was entered between Chrysler and Debtor, a seller of new and used automobiles. Pursuant to various loan documents, Debtor granted Chrysler a continuing security interest in all motor vehicles and all inventory, together with all additions and accessories thereto, contract rights and accounts receivable, and all proceeds therefrom. Chrysler filed a proper financing statement to perfect its interest in the collateral. On December 16, 1996, after the filing of Chrysler's financing statement, Debtor changed its name from Taylor Chrysler, Plymouth, Dodge, Jeep, Eagle, Inc. to Country Chrysler, Plymouth, Dodge, Jeep, Eagle, Inc. The Uniform Commercial Code, as adopted in Georgia, requires a secured party to file "a new appropriate financing statement" within four months after a debtor has made a name change. O.C.G.A. § 11-9-402(7)[1]. On

[1] O.C.G.A § 11-9-402(7) provides:
(7) Where the debtor so changes his name, or in the case of an organization, its name, identity, or corporate structure, that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the

April 28, 1997, more than four months after Debtor's name change, Chrysler filed a U.C.C.3, a form reciting the new name and continuation of a security interest. During this same period First Coast agreed to sell, and delivered, twelve automobiles to Debtor but was not paid.

Debtor defaulted on its financing agreement with Chrysler and on May 27, 1998, Chrysler obtained an immediate writ of possession concerning its collateral from the Superior Court of Evans County, Georgia. Debtor subsequently filed this chapter 11 case on May 28, 1998. Both Chrysler and First Coast were listed on Debtor's schedules as unsecured creditors. On June 1, 1998 Chrysler filed an emergency motion for relief from stay. On June 18, 1998, First Coast filed similar motion as to the twelve automobiles it had sold to Debtor. A hearing for these motions was scheduled for June 24, 1998. The notice for the June 24, 1998 hearing stated in part:

> Pursuant to Bankruptcy Rule 4001(d), the court will consider approval or disapproval of any agreement entered into by the parties with respect to the above motion at the same time and place set forth above. Any party wishing to be notified of the terms of any such agreement or wishing to be heard on the questions of its approval shall appear and be prepared to proceed.

Prior to the hearing Chrysler and Debtor entered into a consent

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expiration of that time.

agreement on Chrysler's motion for relief. The consent order, granting Chrysler relief from stay and determining that Chrysler had a first priority perfected security interest, was entered on July 2, 1998 over the objection of First Coast claiming that Chrysler did not have a perfected security interest in the collateral at issue. This consent order further stipulated that the perfected security interest of Chrysler encompassed the twelve vehicles which First Coast delivered to Debtor and that any dispute involving the relative lien/ownership priorities between Chrysler and First Coast would be dealt with in some other forum. First Coast was similarly granted relief from stay by separate consent order entered on July 2, 1998. First Coast did not file a notice of appeal within 10 days of the entry of the consent order granting Chrysler relief from stay and determining its secured status, as required by Federal Rule of Bankruptcy Procedure 8002(a).

On July 8, 1998, citing the absence of any reasonable likelihood of rehabilitation and the lack of ability to effectuate a plan, Debtor filed this motion to dismiss. First Coast objected again arguing that Chrysler did not have a perfected security interest in the collateral and that a conversion to chapter 7 would allow a trustee to avoid the transfer for the benefit of the unsecured creditors. Along with its objection to the motion to

dismiss, First Coast filed a motion to vacate the previously entered consent order pursuant to Federal Rule of Civil Procedure 60(b)(6) (hereinafter Rule 60(b)(6))[2]. First Coast's Rule 60(b)(6) motion asserts that an injustice will take place if Chrysler is permitted to retain its perfected secured creditor status to the detriment of all other unsecured creditors.

Prior to the filing of First Coast's motion to vacate, Chrysler filed an action against First Coast in the United States District Court for the Southern District of Georgia over Chrysler's dispute with First Coast over the twelve automobiles First Coast delivered to Debtor. This dispute stems from the taking of the twelve vehicles by First Coast under its consent stay relief order. Chrysler's district court action seeks a determination of the relative lien/ownership priorities between Chrysler and First Coast.

First Coast's motion to vacate the consent order between Chrysler and Debtor is brought under Rule 60(b)(6). First Coast

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[2]Federal Rule of Civil Procedure 60(b)(6):
On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
(6) any other reason justifying relief from the operation of the judgment.

Federal Rule of Bankruptcy Procedure 9024 applies Federal Rule of Civil Procedure 60 to bankruptcy cases with certain enumerated exceptions not applicable here.

contends that allowing Chrysler to retain the status of a perfected secured creditor is manifestly unjust because under O.C.G.A. § 11-9-402(7) Chrysler did not file an appropriate new financing statement within four months from Debtor's name change. It is not necessary to address the merits of First Coast's argument concerning Chrysler's status as a perfected secured creditor in resolving the motion.

Pursuant to Federal Rule of Bankruptcy Procedure 8002(a)[3], First Coast had ten days to appeal the order of July 2, 1998 granting relief from stay to Chrysler and declaring Chrysler a perfected secured creditor. While First Coast did object to Chrysler's status at the hearing on June 24, 1998, it failed to appeal the order. Having no other recourse in this court, First Coast now seeks to vacate the order via Rule 60(b)(6).

First Coast's motion to vacate is based upon four arguments, all of which First Coast contends fall under Rule 60(b)(6). First, Chrysler does not have a properly perfected security interest. Second, the improper perfection was a result of Chrysler's own negligence. Third, unsecured creditors had no

[3]Federal Rule of Bankruptcy Procedure 8002(a) In part:
(a) TEN-DAY PERIOD. The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of judgment, order, or decree appealed from.

opportunity to conduct discovery to oppose Chrysler's motion for stay relief. Fourth, unsecured creditors will be denied the opportunity to recover if the order is not vacated. First Coast alleges that the court's failure to address these issues will result in a manifest injustice, and further, represent exceptional circumstances justifying the setting aside of the order. However, these arguments also represent proper grounds for an appeal of the order. The heart of First Coast's arguments is that an incorrect legal determination was made by me in approving and signing the consent order over First Coast's objection. Such an argument is an issue for appeal and First Coast cannot circumvent by a Rule 60 motion its failure to file a notice of appeal within the allotted time. "Rule 60(b) simply may not be used as an end run to effect an appeal outside the specified time limits, otherwise those limits become essentially meaningless." Latham v. Wells Fargo Bank, N.A., 987 F.2d 1199, 1203 (5th Cir. 1993); see also Parks v. U.S. Life and Credit Corp., 677 F.2d 838, 840 (11th Cir. 1982) (A party may not use Rule 60 as a substitute for a timely and proper appeal.); Ellenberg v. Board of Regents of the University System of Georgia (Matter of Midland Mechanical Contractors, Inc.), 194 B.R. 690, 693 (Bkrtcy. N.D.Ga. 1996) (The Rule 60(b) motion should not be used as a substitute for a timely appeal.); 11 Wright, Miller & Kane, Federal

Practice and Procedure § 2851 (2d ed. 1995). (Rule 60 is not a substitute for appeal.). Similar arguments were raised in its objection to the consent order at hearing and no appeal was taken. This Rule 60(b) motion is nothing more than an attempt to circumvent First Coast's failure to file a timely notice of appeal. First Coast's motion to vacate is denied.

As to First Coast's objection to Debtor's motion to dismiss, with the consent order declaring Chrysler to be a perfected secured creditor it is proper to dismiss this proceeding and allow any disputes between First Coast and Chrysler to be heard in the now pending district court case. Once again, the basis for First Coast's objection is based upon its contention that Chrysler is not a perfected secured creditor, a status which was not challenged at the initial stay relief hearing by any other noticed creditor besides First Coast. Pursuant to 11 U.S.C. § 1112(b)[4], this court may dismiss or convert a case for "cause". "The determination of

[4] 11 U.S.C. § 1112(b) In part pertinent:
(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—
(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
(2) inability to effectuate a plan;

cause under § 1112(b) is 'subject to judicial discretion under the circumstances of each case.'" Albany Partners, Ltd. v. W.P. Westbrook, Jr. (In re Albany Partners, Ltd.), 749 F.2d 670, 674 (11th Cir. 1984) (quoting In the Matter of Nancant, 8 B.R. 1005, 1006 (Bankr.D.Mass. 1981)). Debtor contends that dismissal is proper due to its inability to effectuate a plan with Chrysler having had taken possession of all of its new and used vehicle inventory, among other collateral, and that there is now no reasonable likelihood of rehabilitation. Without an inventory of vehicles, Debtor has established proper "cause" to either dismiss this case or convert to chapter 7.

Having found cause to either convert to chapter 7 or to dismiss, I must now determine the best interests of creditors and the estate. 11 U.S.C. § 1112(b). First Coast would have me convert the case to chapter 7 so that all unsecured creditors could benefit from the efforts of a trustee in avoiding the transfer of the vehicles to Chrysler on the basis that Chrysler's security interest is unperfected. This is a well taken concern as First Coast has demonstrated by case law cited, but only if Chrysler is determined not to be a perfected secured creditor. As previously discussed, the consent order entered on July 2, 1998 determines that Chrysler does indeed hold such status:

> 4. Chrysler holds a first priority perfected security interest in the above described collateral subject only to a prior security interest in certain specific used vehicles financed by the Claxton Bank. (First Coast Auto Sales, Inc. ("First Coast") has also filed a motion for stay relief as to 12 used vehicles which are among the vehicles in which Chrysler claims a security interest; the dispute between Chrysler and First Coast need not be addressed in this order for reasons set forth below.)

July 2, 1998 Consent Order, p. 2. The order is final. Due to the lack of assets held by Debtor subsequent to the actions taken by Chrysler upon the entry of the consent order granting stay relief, a conversion to chapter 7 would be futile and merely cause unnecessary expense to all parties involved. Therefore, First Coast's objection to dismissal, and in the alternative seeking conversion to chapter 7, is overruled.

It is, therefore, ORDERED that the motion of First Coast Auto Sales, Inc. to vacate the consent order entered by this court on July 2, 1998 granting stay relief to Chrysler Financial Corporation is denied, and

It is further ORDERED that the objection of First Coast Auto Sales, Inc. to the motion of Country Chrysler, Plymouth, Dodge, Jeep, Eagle, Inc. to dismiss this case is overruled and this chapter

11 case is dismissed.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 12th day of February, 1999.